

HUMAN SERVICES BOARD

INTRODUCTION

The parties entered a Stipulation of Facts that is incorporated in proposed findings of fact one to eleven. The following decision is based on the Stipulation of Facts, testimony and documents submitted at hearing.

FINDINGS OF FACT

Stipulation of Facts

1. Petitioner [L.S.] (hereinafter "Petitioner") operates Ultimate Fitness. LLC (hereinafter "Fitness"), a licensed school age program with Certificate No. 1590 from the Vermont Department for Children and Families.

2. In November of 2005 K.P. was hired as Director of Fitness. In February of 2006 the Child Development Division (hereinafter "CDD") notified Petitioner that K.P. did not have the requisite qualifications to be a Director. However, CDD agreed to allow K.P. to continue as Director if K.P. made the commitment to complete the required courses needed to meet qualification in eighteen months from date of employment. In September of 2006, after a dispute between K.P. and Petitioner, K.P. left Petitioner's employment.

3. In August of 2006, Petitioner hired S.S. as Director of Fitness. S.S. also did not have the qualifications for Director. On July 22, 2007, Petitioner requested a variance to allow S.S. to remain as Director. Initially, CDD denied the variance. However, the original decision to deny the variance was overturned by CDD on appeal and Petitioner was given until January 31, 2008 to submit

documentation that S.S. was qualified to be a Director. No documentation was ever received.

4. On July 22, 2008 a site visit at Fitness was conducted [by] Senior Licensing Field Specialists [K.L.] and [J.F.]. The Licensors noted as an observation (not a violation) that it was unclear whether S.S. was qualified as a director and unclear whether the time period for S.S.'s variance had elapsed. Petitioner was directed to contact [J.D'E.] by August 5, 2008 to discuss S.S. status as director.

5. On August 1, 2008 another site visit was conducted by Licensing Field Specialist [J.D'E.]. [J.D'E.] cited Petitioner for violation of Regulation C3 due to lack of documentation that S.S. had completed necessary course work to qualify for Director position and due to the fact that the variance for S.S. had expired on 1/31/08. [J.D'E.] gave Petitioner until August 15, 2008 to provide CDD with documentation of completed CDA course and the scheduled date for assessment. The requested documentation was never provided to CDD.

6. While S.S. was attempting to complete her CDA requirements, Petitioner hired B.H. as Director of Fitness. On February 4, 2009 CDD informed Petitioner that B.H. did not

have the necessary qualifications to be in the Director position. B.H. resigned from her position as Director. CDD also informed Petitioner that she would need to hire a qualified director or reduce capacity to twelve.

7. On April 8, 2009 another site visit was performed by [J.D'E.]. [J.D'E.] again cited Petitioner for a violation of Regulation C3. [J.D'E.] gave Petitioner until April 20, 2009 to either hire a qualified director or reduce capacity to twelve children. Petitioner's capacity continues to be at thirty children.

8. Sometime after the April 8, 2009 site visit, Petitioner informed Licensing Supervisor [K.A.] that K.M. had been hired as Director of Fitness and would begin as Director on June 26, 2009. K.M. never began her employment at Fitness.

9. On July 28, 2009, [J.D'E.] again made a site visit to Fitness and again cited Petitioner for violation of Regulation C3. [J.D'E.] informed Petitioner that she must either immediately hire a qualified director or immediately reduce capacity to twelve children. Petitioner then applied for a variance to have D.O. to fill the Director position at Fitness. Petitioner's variance was denied on September 8, 2009.

10. On November 16, 2009, CDD notified Petitioner of its intent to revoke her child care license.

11. During the period of time in which there was no qualified director present, Petitioner's program was cited for lack of supervision of children warranting a serious violation and parental notification letter. Additionally, basic health and safety violations related to emergency evacuations and hand washing were cited.

Facts adduced at hearing

12. Petitioner has operated a health club for approximately twenty-two years. Petitioner has been licensed by the CDD to provide school-age programs since 1996 or 1997. When she moved into her present location, she was relicensed by the CDD.

13. Fitness is an activity-based program for school-age children that operates before school for 1.5 hours and after school for 1.5 to 2 hours. The director's position is part-time.

Fitness has a 1600 square foot fitness room, a large outdoor yard, a small room for reading and more quiet activities, and dedicated bathrooms for the children.

14. The children attending Fitness range in age from five to thirteen years. The Fitness license allows for

thirty children to attend. Petitioner has an arrangement in which the school bus serving the local school district includes Fitness as part of its route. The majority of the children using Fitness live within the local community. Parents value the program.¹

15. J.D'E. is a Licensing Field Specialist who has been employed by CDD for fourteen years. As a licensing field specialist, she monitors child care programs, performs site visits, and provides technical assistance for programs. Until six months ago, J.D'E. had been the case manager for Fitness for several years. Her caseload is approximately 300 programs.

16. K.A. is a Licensing Supervisor who has been employed by CDD for five years. She supervises the Licensing Field Specialists and is involved in decisions affecting the continuing operation of child care programs. K.A. was a Director of a child care program for ten years and then an international validator of child care programs. She has a Bachelor's degree in early childhood education and is working on her Master's degree.

¹ Petitioner provided a petition and letters from parents that support keeping Fitness open.

Variance Request

17. Petitioner learned about D.O. from a mutual friend and decided to hire D.O. as the director.²

18. D.O. lived in Florida and Rhode Island prior to moving to Vermont. In Florida, D.O. worked first as a paralegal and then for 1.5 years as a child protection investigator for the Florida Department for Children and Families. In Rhode Island, D.O. worked for nine years in the Department of the Attorney General as a paralegal and then as a victim assistance advocate. D.O. was also a CASA³ in Rhode Island. She was a supervisor for a group home for girls aged eight to thirteen years. Her volunteer activities included coaching little league.

D.O. has a Bachelor's degree from Barry University with a major in Behavioral Sciences.

19. At the time petitioner hired D.O. to be director, D.O. did not meet the criteria for a director. CDD found that D.O. had not completed the requisite coursework and did not have the requisite experience working with children in a

² D.O. is now D.H. For the purposes of this decision, she will be referred to as D.O.

³ CASA stands for Court Appointed Special Advocate. A CASA is appointed for abused and neglected children and serves in a similar capacity to a guardian ad litem.

capacity that included curriculum development and supervision of staff.

20. At hearing, D.O. provided documentation that she completed a course in child development as of April 29, 2010.

21. K.A. testified that course requirements are reviewed by a number of CDD staff and that they look for courses dealing with early education, elementary education, human development and recreation. D.O. did not have the requisite courses when petitioner applied for the variance. K.A. explained that D.O. did not have the requisite experience working with children. The CDD looks for experience with children that includes working with groups of school age children over an extended period of time, curriculum development, and supervision of staff. Activities such as little league do not provide that level of experience.

Revocation

22. Petitioner's problems finding a qualified director began after S.R. left as director. S.R. was director for five years; S.R. was granted a variance for approximately

five years to complete her certification through CDA.⁴ All parties agree that S.R. was a good director.

23. Petitioner's process to find directors includes looking at present staff, asking local teachers for recommendations, and generally through word of mouth.

24. Petitioner hired K.P. during November 2005. Petitioner knew K.P. as a young woman who was an aide at a local elementary school.

25. K.P. was given an opportunity to complete the CDA process but did not do so.

26. When K.P. left petitioner's employment in September 2006, petitioner hired her daughter, S.S., to be director. S.S. had previously started the CDA process.

27. Petitioner received a variance for S.S. to act as director with the condition that petitioner had until January 31, 2008 to submit documentation that S.S. had completed the qualifications for the director position.

28. S.S. did not complete the CDA process by January 31, 2008, and based on testimony, has not yet completed these requirements.

⁴ The Council for Professional Recognition (non-profit organization) oversees the CDA (Child Development Associate) national accreditation program. They have developed national competency skills. See www.cdacouncil.org.

29. Petitioner has been without a qualified director since January 31, 2008.

30. D.O. is the last person that petitioner hired as director of Fitness. Petitioner's variance request for D.O. was denied on September 8, 2009 and upheld in a Commissioner's Review on December 1, 2009.

31. Petitioner did not seek a qualified director during the pendency of this action.

32. Starting with the February 2009 site visit, petitioner was asked to either hire a qualified director or reduce her capacity to twelve children. Petitioner did not do so.

CDD made this same request at least two times subsequently, but petitioner did not do.

Reducing capacity to twelve children would bring the petitioner into compliance with the regulations.

ORDER

CDD's decisions to deny a variance for D.O. to be director and to issue intent to revoke license are affirmed.

REASONS

The CDD has promulgated regulations governing the operation of Child Care Programs providing School Age Care to

ensure the quality of care for children and the protection of children. The regulations governing petitioner's program are found in the Children's Day Care Licensing Regulations for School Age Care (hereinafter Reg.).

Each program is required to have a director and head teacher although the same person may fill both positions in programs serving 59 or fewer children. Reg. C1. The director is charged with the overall operation of the program. Reg. Definitions.

To ensure that the director is qualified to operate a program, CDC has developed standards based on the number of children served. In petitioner's case, the qualifications are set out in Reg. C3 as follows:

The person (Director and/or Head Teacher) responsible for developing and implementing the program in a facility of between thirteen (13) and fifty-nine (59) children shall have at least the following qualifications:

-CDA, CCP, or Associate's Degree in Early Childhood Education, Elementary Education, Human Development, or Recreation and two (2) years experience with groups of schoolage experience, or

-BA/BS with four courses in Early Childhood Education, Elementary Education, Human Development, or Recreation related topics and two (2) years experience with groups of schoolage children, or

-BA/BS in Early Childhood Education or Human/Child Development, or Recreation and one (1) year experience with groups of schoolage children, or

-Three (3) years successful experience in a youth or recreational program and four (4) higher education courses successfully completed relative to the population being served. These higher education courses may be completed within eighteen (18) months of employment.

Variance Denial (Fair Hearing B-11/09-610)

CDD has the authority in "exceptional circumstances" to grant a variance to the regulations. Variance is defined at Reg. Definitions as:

An exception to a regulation granted by the Commissioner in exceptional circumstances when, in his or her discretion, the literal application of the regulation will result in unnecessary hardship and when the intent of the regulation can be achieved by other means.

The Board's authority to review a variance denial is limited to whether the Commissioner or his designee abused his/her discretion. Fair Hearing Nos. 19,714 and T-08/08-374.

CDD reviewed petitioner's variance request under the last criteria in Reg. C3 requiring three years of experience in youth or recreational programs and four related higher education courses. They reviewed D.O.'s transcript and gave her credit for three courses. More importantly, they did not find that D.O. had the requisite three years of experience.

D.O. has a Bachelor's degree in Behavioral Science. Her experience with children has been primarily in the areas of

child protection and helping child victims of crime, and she is to be commended for dealing with these difficult issues. However, D.O.'s experience with youth or recreation programs was limited to little league coaching until her work at Fitness.

CDD denied the variance because they did not believe that D.O.'s experience met the three year requirement in the regulations.

At hearing, D.O. provided documentation that she completed the credits for a fourth course. However, the experience issue remained. K.A. indicated that they are looking for experience that includes programming, curriculum development, extended work with school age children, and staff supervision that activities such as coaching little league do not provide.

Based on the above, the Board cannot conclude that the CDD abused their discretion by denying a variance.

Revocation (Fair Hearing No. B-12/10-664)

The CDD has the authority to revoke a license when there has been a violation of law or regulation. Reg. M.11. The CDD has "the burden of proving facts alleged" as the basis for the intended revocation. Reg. M14(e). If there is a factual basis, the Board may not substitute their judgment

but limit their review to whether the CDD acted arbitrarily, capriciously, or otherwise abused their discretion.

Huntington v. SRS, 139 Vt. 416 (1981), Fair Hearing Nos. 15.006; 15,027; 15,622, and 16,485.

The CDD decided to revoke petitioner's license due to the continued inability by petitioner to find a qualified director over an extended period of time.

As the Stipulated Facts demonstrate petitioner sought approval for five individuals starting November 2005 to serve as director. Although there was a short period from July 2007 through January 2008 when Fitness operated under a variance, Fitness has not had a qualified director for approximately four years of the last five years. Petitioner was advised to reduce her capacity to twelve children in order to mitigate the lack of a director but did not do so. She was also advised, in the alternative, to find a qualified director but did not do so.

The parties agree that the past few years have been frustrating. J.D'E. has worked consistently with petitioner to find a solution. During this time, there has been one serious violation necessitating parental notification. CDD's fear is that without a qualified director, more problems will arise.

One can sympathize with petitioner because her program fills a niche that is valued by the parents and children using the program. However, there is no basis for finding that the CDD abused their discretion by acting to revoke after an extended period of noncompliance.

Conclusion

Based on the foregoing, the CDD did not abuse their discretion by denying a variance to petitioner or by revoking petitioner's license. Accordingly, CDD's decision in Fair Hearing No. B-11/09-601 and in Fair Hearing B-12/09-664 is affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rules No. 1000.4D.

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